122 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Entergy Gulf States, Inc., on behalf of
Entergy Gulf States Louisiana, L.L.C.
and Entergy Texas, Inc.

Docket No. EL08-4-000

ORDER CONDITIONALLY GRANTING PETITION FOR DECLARATORY ORDER

(Issued January 31, 2008)

1. On October 12, 2007, Entergy Gulf States, Inc. (Entergy Gulf States), on behalf of Entergy Gulf States Louisiana, L.L.C. (EGS-LA), a Louisiana limited liability company, and Entergy Texas, Inc. (EGS-TX), a Texas corporation, which, as explained below, were both formed in connection with a restructuring of Entergy Gulf States, filed a petition for a declaratory order (the Petition). The Petition requests that the Commission find that the payment of one or more dividends out of paid-in capital by EGS-LA and EGS-TX to their parent, Entergy Corporation (Entergy), under the facts and circumstances described herein, will not violate section 305(a) of the Federal Power Act (FPA);[1] the Petition seeks to obtain for EGS-LA and EGS-TX, the two new integrated utilities that were created when Entergy Gulf States' public utility systems in Louisiana and Texas were separated pursuant to a restructuring plan, described below, the same authorization to pay dividends out of paid-in capital that was granted to Entergy Gulf States in Docket No. EL07-34-000 on March 30, 2007.[2] We will conditionally grant the Petition and conditionally authorize the payment of dividends out of paid-in capital.

Background

2. Entergy Gulf States is a direct, wholly-owned subsidiary of Entergy. Entergy Gulf States is a fully integrated electric utility providing generation, transmission and distribution service in southeastern Texas and southern Louisiana. It is regulated in

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[1] 16 U.S.C. § 825d(a) (2000).

[2] *See Entergy Gulf States, Inc.*, 118 FERC ¶ 61,271 (2007) (March 30 Order).

Louisiana by the Louisiana Public Service Commission (Louisiana Commission) and in Texas by the Public Utility Commission of Texas (Texas Commission).

3. To finance a portion of Entergy Gulf States' reconstruction costs resulting from Hurricanes Katrina and Rita, which hit Entergy Gulf States' service territory in August and September 2005, Entergy made a $300 million cash capital contribution to Entergy Gulf States in December 2005. Entergy Gulf States financed the remaining hurricane reconstruction costs with internally generated funds and through the issuance of first mortgage bonds.

4. As noted above, the March 30 Order conditionally granted Entergy Gulf States' authorization under section 305(a) of the FPA to use up to $300 million of the aggregate net proceeds from securitization financings under certain Louisiana and Texas enabling statutes to pay dividends to Entergy.[3] This payment of dividends would have the effect of returning to Entergy all or a portion of the $300 million cash capital contribution made by Entergy in December 2005. The March 30 Order found that the concerns underlying section 305(a) were not present in the circumstances of the transaction, but conditioned approval on a requirement that Entergy Gulf States may only pay dividends out of paid-in capital so long as Entergy Gulf States maintains a minimum equity balance equal to 30 percent of total capital.[4]

5. On July 20, 2007, the Commission issued an order granting Entergy Gulf States, EGS-LA and EGS-TX relief under FPA sections 203 and 305(a) in Docket Nos. EC07-66-000, *et al*. with respect to that proposed separation plan (the Separation Plan), separating Entergy Gulf States' Louisiana and Texas public utility systems into two new integrated utilities: EGS-LA, which will serve Entergy Gulf States' retail customers located in the State of Louisiana and Entergy Gulf States' wholesale customers, and EGS-TX, which will serve Entergy Gulf States' retail customers located in the State of

[3] *See supra* note 2. Entergy Gulf States previously explained that, under state enabling statutes, the state commissions would issue financing orders authorizing the issuance of the securitization bonds and, in turn, the billing and collection of storm recovery charges from Entergy Gulf States' retail customers. In the Petition, Entergy Gulf States describes and updates the Commission on the status of the various financing orders and related matters in Louisiana and Texas. *See* Petition at 4-5.

[4] March 30 Order, 118 FERC ¶ 61,271 at P 12.

Texas.[5] On January 10, 2008, Entergy Services, Inc., on behalf of Entergy Gulf States, EGS-LA, and EGS-TX, notified the Commission that the Separation Plan transaction was consummated on December 31, 2007.

6. In the Petition, Entergy Gulf States explains that at the time it filed its earlier petition in Docket No. EL07-34-000, it was expected that the proposed payment of dividends from paid-in capital described in that petition would be completed in 2007 prior to implementation of the Separation Plan. However, for a variety of reasons, Entergy Gulf States delayed the payments until after completion of the separation of Entergy Gulf States into the two new entities: EGS-LA and EGS-TX. Accordingly, inasmuch as neither EGS-LA nor EGS-TX were petitioners in Docket No. EL07-34-000, Entergy Gulf States now requests, on behalf of EGS-LA and EGS-TX, a new finding under section 305(a) of the FPA that, under the facts and circumstances described in the Petition, the payment of one or more dividends by EGS-LA and EGS-TX from paid-in

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[5] *See Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007) (Separation Order). In the Petition (at page 3, note 2), Entergy Gulf States explains that:

> The Separation Plan will be implemented in five steps or their functional equivalent. In step one, Entergy Gulf States will form EGS-TX as a Texas corporation under the Texas Business Corporation Act. Entergy Gulf States will allocate all of its Texas jurisdictional assets to EGS-TX, and EGS-TX will assume its prorated share of each series of Entergy Gulf States' long-term debt pursuant to debt assumption agreements. In conjunction with step 1, Entergy Gulf States will be renamed "Entergy Gulf States Louisiana, Inc." ("EGS-LA Inc."). In step two, EGS-LA Inc. will distribute all of the approximately 46,525,000 shares of common stock of EGS-TX acquired in step one to Entergy, as a result of which EGS-TX will become a direct, wholly-owned, subsidiary of Entergy. In step three, Entergy will form a new Texas corporation, EGS Holdings, Inc. ("EGSHI"). Entergy will contribute the shares of common stock of EGS-LA Inc. to EGSHI, such that Entergy will directly own EGSHI and EGSHI will directly own EGS-LA Inc. In step four, EGSHI will form EGS-LA, a new Louisiana limited liability company, and will acquire and own all of the issued and outstanding common membership interests of EGS-LA. In step five, EGS-LA Inc. will merge into EGS-LA, with EGS-LA as the surviving entity. EGS-LA will succeed to and assume all of EGS-LA Inc.'s Louisiana assets, rate schedules, and service agreements and provide electric service to EGS-LA Inc.'s Louisiana retail customers without interruption.

capital using, in the aggregate, up to $300 million of the proceeds of the securitization financings, will not violate section 305(a) of the FPA. Entergy Gulf States requests that the order issued in this proceeding replace and supersede the March 30 Order if the Separation Plan is implemented.[6]

7. Entergy Gulf States commits, on behalf of EGS-LA and EGS-TX, that the cumulative dividends from paid-in capital using securitization proceeds will not exceed $300 million, the amount of the cash capital contribution made by Entergy in December 2005 to pay for hurricane recovery costs, and that, of this amount, not more than $150 million of dividends from paid-in capital will be paid by EGS-LA and not more than $150 million of dividends from paid-in capital will be paid by EGS-TX, with any balance utilized to retire existing debt.

8. Entergy Gulf States further commits, on behalf of EGS-LA and EGS-TX, that neither EGS-LA nor EGS-TX will pay any dividend based on the relief requested if, as a result thereof, its proprietary capital ratio drops to below 30 percent. Entergy Gulf States states that this is the same commitment made in Docket No. EL07-34-000 and incorporated in the terms of the March 30 Order.

Notice of Filing

9. Notice of Entergy Gulf States' filing was published in the *Federal Register*,[7] with interventions or protests due on or before November 2, 2007. A notice of intervention raising no issues was filed by the Louisiana Public Service Commission.

Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notice of intervention of the Louisiana Public Service Commission serves to make it a party to this proceeding.

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[6] *See id.* at 6-7. As noted above, the Commission was subsequently notified, on January 10, 2008, that the Separation Plan transaction was consummated on December 31, 2007.

[7] 72 Fed. Reg. 60,832 (2007).

B. **Commission Determination**

11. We will conditionally grant Entergy Gulf States' petition on behalf of EGS-LA and EGS-TX, because the concerns underlying section 305(a) of the FPA are not present in the circumstances of this transaction.[8] In this regard, we note that this order grants the same authorization to pay dividends out of paid-in capital that was granted in the March 30 Order, but to EGS-LA and EGS-TX.

12. Section 305(a) provides that:

> It shall be unlawful for any officer or director of any public utility . . . to participate in the making or paying of any dividends of such public utility from any funds properly included in capital accounts.[9]

13. The concerns underlying the enactment of section 305(a) included "that sources from which cash dividends were paid were not clearly identified and that holding companies had been paying out excessive dividends on the securities of their operating companies."[10]

14. We find that Entergy Gulf States, on behalf of EGS-LA and EGS-TX, has clearly identified the source from which payment will be made. The dividends, which will not exceed $300 million in the aggregate, the amount of Entergy's cash capital contribution to Entergy Gulf States, will be made by EGS-LA and EGS-TX using a portion of the net proceeds from the securitization financings (subject to the individual limits proposed for EGS-LA and EGS-TX of $150 million each). The dividends will be reflected as a reduction in Account No. 211,[11] where Entergy's $300 million cash capital contribution to Entergy Gulf States was recorded.

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[8] As requested by Entergy Gulf States in the Petition (at pages 6-7), the order issued in this proceeding will replace and supersede the March 30 Order, as we received notification on January 10, 2008 that the Separation Plan transaction was consummated on December 31, 2007.

[9] 16 U.S.C. § 825d(a) (2000).

[10] *See Exelon Generation Co., LLC*, 114 FERC ¶ 61,317, at P 13 (2006); *Entergy Louisiana Inc.*, 114 FERC ¶ 61,060, at P 12 (2006); *Exelon Corp.*, 109 FERC ¶ 61,172, at P 8 (2004); *ALLETE, Inc.*, 107 FERC ¶ 61,041, at P 10 (2004).

[11] *See* 18 C.F.R. Part 101, Account No. 211 (Miscellaneous Paid-In-Capital) (2007).

15. We also find that the proposed dividends would not affect the ownership of EGS-LA and EGS-TX. Pursuant to the Separation Plan, EGS-LA is an indirect, wholly-owned subsidiary of Entergy, and EGS-TX is a direct, wholly-owned subsidiary of Entergy. The dividends, thus, will have no adverse effect on the value of shareholders' interests in either company, since Entergy, the sole common stock shareholder of both EGS-TX and EGSHI, which owns all of the membership interests in EGS-LA, will be the sole recipient of the dividends.[12]

16. With regard to whether the dividends would be excessive, Entergy Gulf States, on behalf of EGS-LA and EGS-TX, states that following the securitization financings and application of the proceeds to reduce equity and retire certain debt, including the payment of dividends to Entergy, EGS-LA's equity ratio will be 34.32 percent and EGS-TX's equity ratio will be 46.97 percent.[13] In addition, Entergy Gulf States, on behalf of EGS-LA and EGS-TX, commits not to pay any dividend based on the authorization granted herein if EGS-LA's or EGS-TX's equity ratio would drop below 30 percent.[14] Consistent with this commitment, we conditionally grant the Petition subject to a requirement that EGS-LA and EGS-TX may only pay dividends out of paid-in capital so long as they maintain a minimum equity balance equal to 30 percent of total capital.[15]

17. For these reasons, and under the circumstances of this case, we will conditionally grant the Petition and conditionally authorize the requested payment of dividends.

The Commission orders:

(A) Entergy Gulf States' petition for declaratory order, on behalf of EGS-LA and EGS-TX, is hereby conditionally granted, as discussed in the body of this order.

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[12] Entergy Gulf States explains that the dividends received by EGSHI from EGS-LA may, in turn, be distributed as a dividend by EGSHI to Entergy. *See* Petition at 12, n. 12.

[13] *See id*. at 10-11.

[14] *See id.* at 7.

[15] *See, e.g., Cincinnati Gas and Electric Co. d/b/a Duke Energy Ohio*, 115 FERC ¶ 61,250, at P 13 (2006); *Entergy Louisiana, Inc.*, 114 FERC ¶ 61,060, at P 13 (2006).

(B) EGS-LA and EGS-TX must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the petition for declaratory order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.